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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 743

UNITED STATES OF AMERICA EX REL. W. B. PYRON, PETITIONER AND APPELLEE BELOW,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND C. C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE, RESPONDENTS AND APPELLANTS BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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(35,665)

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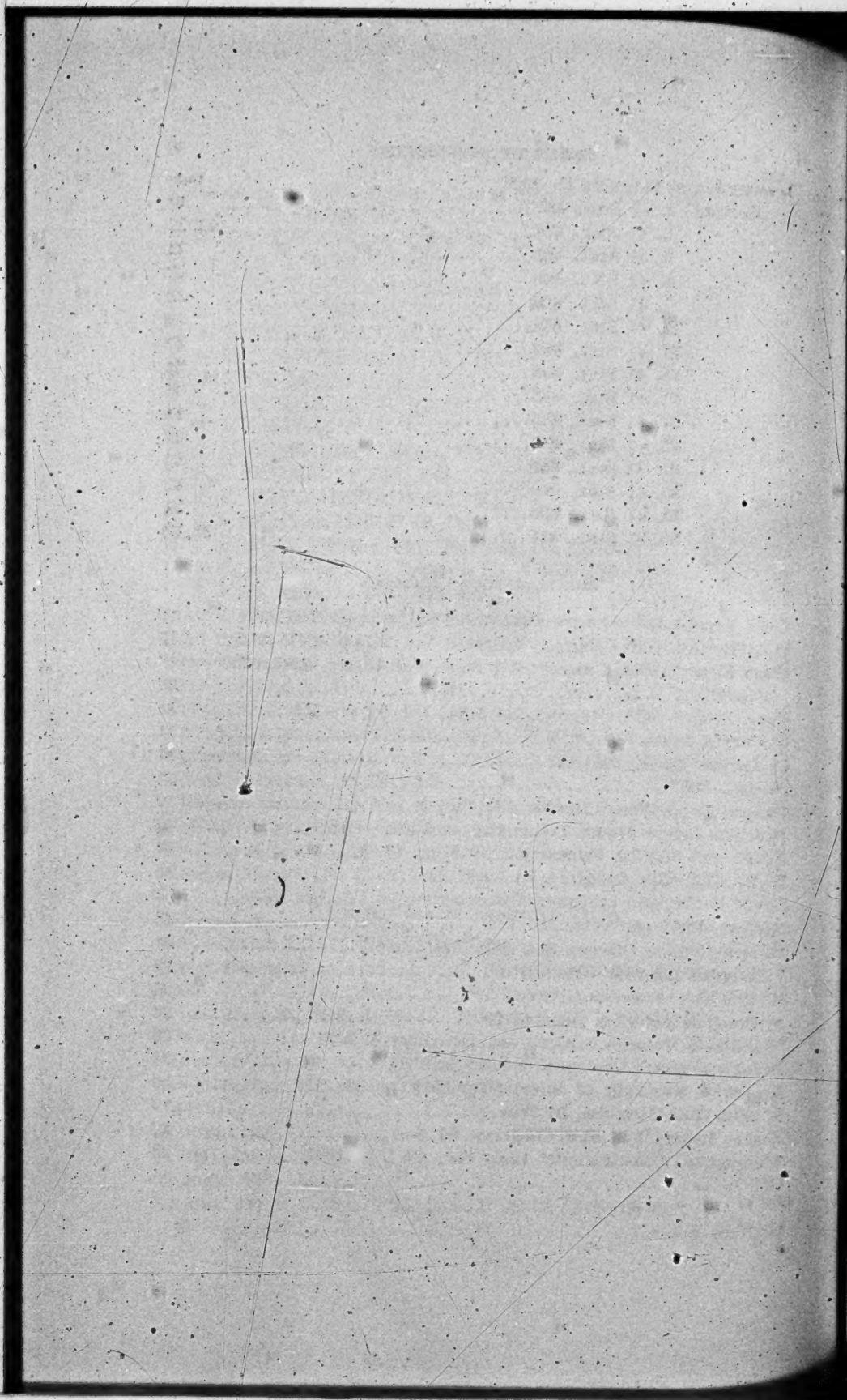

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 743

UNITED STATES OF AMERICA EX REL. W. B. PYRON, PETITIONER AND APPELLEE BELOW,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND C. C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE, RESPONDENTS AND APPELLANTS BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of W. B. Pyron respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

History of the Proceeding.

This is an action at law brought in the Supreme Court of the District of Columbia by W. B. Pyron,

petitioner herein, against Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, respondents herein, for a writ of mandamus commanding the said respondents to accept for filing and to file the petitioner's application for a permit to prospect for oil and gas on certain lands under the Act of Congress approved February 25, 1920 (41 Stat. 437; U. S. C., Title 30, sec. 181) and to proceed therewith according to law (R. 1). The respondents filed an answer and later an amended answer (R. 13). Thereafter testimony was heard by the court without a jury (R. 19). On April 19, 1930, the Supreme Court of the District of Columbia entered its judgment in favor of the petitioner and directed that a writ of mandamus issue requiring the respondents to accept for filing and to file the application of the petitioner specified in the cause and to proceed therewith according to law (R. 20). From this judgment, the respondents appealed to the Court of Appeals of the District of Columbia (R. 21).

At or about the same time, the Supreme Court of the District of Columbia rendered similar judgments in three other cases involving a similar question, which cases were likewise appealed to the Court of Appeals of the District of Columbia, and in that court were argued and presented at the same time as the instant case. The names of the said cases with their numbers in the Court of Appeals are: *Ray Lyman Wilbur, Secretary of the Department of the Interior, v. United States of America, ex rel. Roy A. Barton,* No. 5241; *Ray Lyman Wilbur, Secretary of the Interior Department, v. United States of America, ex rel. Ethel Mc-*

Lennan, No. 5247; and *Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, v. United States of America, ex rel. H. H. Simpson*, No. 5251 (R. 27).

On December 1, 1930, the Court of Appeals of the District of Columbia reversed the judgment of the Supreme Court of the District of Columbia in the instant case and remanded the cause, at the same time likewise reversing the judgments in and remanding the three other causes above named (R. 27, 37). One of the justices dissented from the said judgments (R. 27).

The opinion of the Supreme Court of the District of Columbia in the instant case appears at page 19 of the Record. The Court of Appeals did not accompany its decision in the instant case with an opinion but referred, as controlling in the instant case, to the decision of the court in case No. 5241, *Wilbur v. Barton* (R. 27). The opinion of the Court of Appeals in the case of *Wilbur v. Barton* appears at page 28 of the Record. The dissenting opinion of Mr. Justice Van Orsdel of the Court of Appeals in that case appears at page 37 of the Record. The opinions of the courts are not yet reported.

Facts.

On December 9, 1929, W. B. Pyron, the petitioner, through his attorney, advised the Register of the United States District Land Office at Sacramento, California, that he proposed to file with the Register, in accordance with the Act of February 25, 1920, an ap-

plication for a permit to prospect for oil and gas on certain public lands in Fresno County, California. Petitioner's attorney was advised by the Register that no applications for such permits were being received or could be received by him, since the Secretary of the Interior had ordered Registers not to receive applications after March 12, 1929, and that if an application were presented for filing it would be returned without any record having been made of its receipt and without any consideration having been given the same. The Register further advised petitioner's attorney that if he contemplated the institution of proceedings to compel the acceptance and consideration of the application it should be forwarded to Washington for filing with the Commissioner of the General Land Office (R. 5).

Petitioner's attorney subsequently mailed to the Register such an application, accompanied by the necessary bond and filing fee, but same were returned without being filed. Petitioner's petition for mandamus alleged such presentation to the Register (R. 5), and although such allegation was denied for lack of knowledge by respondents' amended answer (R. 13), it was admitted in open court by counsel for respondents, and such admission was stipulated to by counsel for respondents (R. 21, 22).

On December 14, 1929, the petitioner through his Washington counsel presented to the General Land Office of the Interior Department his application, in proper form and accompanied by the necessary bond and filing fee (R. 10-12). The Land Office refused to accept or to consider the application. It was returned

to petitioner's attorneys with a letter of transmittal which stated that because of the order of the Secretary of the Interior directing Registers not to accept any applications after March 12, 1929, the application could not be received (R. 16).

The Question Involved.

May the Secretary of the Interior lawfully refuse to accept or to consider the application of W. B. Pyron for a permit to prospect for oil and gas on public lands, presented in accordance with the Act of February 25, 1920 (41 Stat. 437)?

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The question arising here of the right of a qualified applicant for a permit to prospect for oil and gas who presents his application in accordance with the Act entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," approved February 25, 1920, to have his application accepted and considered, is of general importance.

(2) The case involves a question of substance relating to the construction and application of the Act of February 25, 1920, which has not been, but should be, settled by this Court.

(3) The case involves a question of substance relating to the construction and application of the Act en-

titled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910, which has not been, but should be, settled by this Court.

(4) The Court of Appeals did not give proper effect to the decision of this Court in the case of *U. S. v. Midwest Oil Company*, 236 U. S. 459, as to the implied power of the Executive to make withdrawals of public lands for public purposes.

The general importance of the question here involved is evident from the statement of the majority opinion of the Court of Appeals of the District of Columbia that, if the judgment of the trial court should be affirmed, "it probably would result in the reinstatement of 'more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices' ". It follows that if the judgment of the Court of Appeals becomes final, it will result in the denial to all such applicants of the right to have their applications filed and considered, not because of any lack of qualification on the part of the applicants or because of any defects in their applications, but solely because of a policy with respect to the development of the public lands of the United States adopted by the Executive Department without legislative sanction. The question is also important because the action of the respondents which was approved by the decision of the Court of Appeals not only denies to a large number of individual applicants the benefits of the Act, but also

denies to the Government the assistance of private enterprise and initiative in developing the mineral resources in the public lands, and deprives the Government of the protection to its own interest in such mineral resources resulting from the discovery, through private initiative and enterprise, of the mineral character of certain public lands, whereby the Government is put on notice that title to such lands should not be permitted to pass from the Government to private ownership under the homestead or other laws pertaining to lands not known to have mineral value.

The effect of the action of the respondents in refusing to accept or consider any applications for prospecting permits under the Act of February 25, 1920, was to suspend the operation of the act as to oil and gas. The effect of the decision of the Court of Appeals is to approve such suspension. The case, therefore, involves a fundamental question as to the construction and application of the Act, namely, whether it lays upon the Executive Department a mandatory duty, or confers upon it a discretionary power; whether it declares the policy of the United States with respect to the development of public lands and provides a method for such development, or whether it leaves the determination of such policy to the Executive Department; whether, in short, this Act of Congress, in so far as respects oil and gas, may be completely suspended and its operation wholly nullified by an act of the Executive Department.

Moreover, the Court of Appeals adopted a construction of the Act of February 25, 1920, which, in petitioner's view, renders that Act unconstitutional. Such

construction involves a delegation by Congress to an administrative official of the power to determine the policy of the law, whether that policy should be to develop and promote mining, or whether it should be one of absolute inactivity. Such delegation of power without limitation and without laying down any rules to guide the administrative official in determining such policy, it is submitted, would be unconstitutional. For this reason also, the decision of the Court of Appeals involves a question of substance relating to the construction and application of the Act.

The Court of Appeals decided that under the Act of June 25, 1910, 36 Stat. 847, which expressly authorized the President to make temporary withdrawals "from settlement, location, sale or entry of the public lands of the United States" and prescribed certain details with respect to such withdrawals, the Executive Department had a right to withdraw public lands from the operation of the Act of February 25, 1920, as respects oil and gas, in effect without limitation either as to the time during which such withdrawal should continue, or as to the quantity of land included in the withdrawal, or as to the purposes of the withdrawal, and without specifically describing any of the lands or carrying out any of the administrative details prescribed. The petitioner's position is that withdrawals from the operation of the Leasing Act of February 25, 1920, are not authorized by the Act of June 25, 1910; but that if that Act is properly construed as authorizing such withdrawals, they must be temporary, the lands must be specifically described, the area

of land withdrawn must have some limitation, the purposes of the withdrawal must be specified and must be similar in character to the purposes specified in the Act, and certain administrative details must be carried out. The questions, whether the Act of June 25, 1910, has any application to the present situation, and whether, if it has, it supports such executive action as is here involved, are fundamental questions as to the construction and application of the Act.

The Court of Appeals also held that, even if the Act of June 25, 1910, has no application in the instant case, the action of the respondents might be supported under the authority of *United States v. Midwest Oil Company*, 236 U. S. 459. It is the view of the petitioner that this decision of this Court, while it recognized an implied power in the Executive Department to withdraw lands, recognized that such power existed only through the acquiescence of Congress, and only to the extent exercised in executive withdrawals which had occurred prior to the time of the decision and for purposes of the same character. It is the view of the petitioner that the present withdrawal, if the action of the Executive in the instant case may be treated as a withdrawal, is entirely different from withdrawals of the kind authorized under the Midwest decision. It is also the view of the petitioner that in the Midwest decision, this Court, while recognizing the implied power of the President in the absence of legislation, did not recognize such implied power as existing after the passage of the Withdrawal Act of June 25, 1910, but did recognize that act as a restric-

tion of such power. The case, therefore, involves a question as to the application of the decision of this Court in the Midwest case.

Your petitioner, therefore, prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Court of Appeals of the District of Columbia, commanding that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in this case, and that the judgment of said Court of Appeals of the District of Columbia may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may deem proper.

Respectfully submitted,

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Petitioner,

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JOHN W. FISHER,
Counsel for Petitioner.

A. W. GREGG,
WESTON VERNON, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

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RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND C. C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE, RESPONDENTS AND APPELLANTS BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of the District of Columbia was filed April 15, 1930. It is not officially reported. It appears at page 19 of the printed Record.

The Court of Appeals of the District of Columbia did not accompany its decision in the instant case with an opinion (R. 27). The opinion in which the court

gave its reasons for its judgment in the instant case was handed down in the case of *Ray Lyman Wilbur, Secretary of the Interior, v. United States of America ex rel. Roy G. Barton* (Court of Appeals No. 5241). This opinion appears at page 28 of the printed Record. It has not yet been officially reported. The dissenting opinion of Mr. Justice Van Orsdel appears at page 38 of the printed Record.

II.

Jurisdiction.

The date of the judgment to be reviewed is December 1, 1930 (R. 27).

The statutory provision which is believed to sustain the jurisdiction is Section 240, Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; U. S. C., Title 28, sec. 347).

III.

Statement of the Case.

A statement of the case has been given in the preceding petition under heading "A" (pp. 1, 2) and will not be repeated here.

IV.

Specification of Errors.

1. The Court of Appeals of the District of Columbia erred in holding that under the Act of February 25,

1920, the respondents had authority to refuse to accept or consider any applications for prospecting permits after March 12, 1929, and to refuse to accept or consider petitioner's application pursuant to such general policy.

2. The Court of Appeals of the District of Columbia erred in holding that the action of the respondents constituted a valid withdrawal of all public lands from prospecting for oil and gas.

3. The Court of Appeals of the District of Columbia erred in holding that the Executive Department had power to make such a withdrawal from the operation of the Leasing Act of February 25, 1920, as is here involved.

4. The Court of Appeals of the District of Columbia erred in holding that this was not a proper case for the issuance of a writ of mandamus.

V.

ARGUMENT.

Summary of the Argument.

A.

The refusal of the respondents to accept or consider any applications for prospecting permits after March 12, 1929, and their refusal to accept or consider petitioner's application is contrary to the Leasing Act of February 25, 1920.

1. *The purpose of the Leasing Act was to encourage the exploration of the public domain and the discovery*

of its mineral resources, and to promote the mining of oil and gas on public lands through the issuance of prospecting permits and leases.

2. *The Leasing Act makes it mandatory for the Secretary of the Interior to accept applications for prospecting permits, and to issue such permits to qualified applicants.*

3. *If the Leasing Act is construed to confer authority on the Secretary of the Interior at his discretion to refuse to accept applications for prospecting permits and to refuse to issue such permits, it is unconstitutional in that it confers legislative power on an executive officer.*

B.

There has been no valid, effective withdrawal of all public lands from prospecting for oil and gas.

1. *The extreme limit of the present power of the Executive to make general withdrawals of public lands is defined by the Act of June 25, 1910.*

2. *The action of the executive officers in the present case was neither intended as a withdrawal under the Act of June 25, 1910, nor did it comply therewith.*

3. *Even if, in addition to his express power under the Act of June 25, 1910, the President has implied power to withdraw public lands under the doctrine of U. S. v. Midwest Oil Co., 236 U. S. 459, the alleged withdrawal here involved cannot be supported on the authority of that decision.*

C.

The Executive has no power to make a general withdrawal of all public lands from the operation of the Leasing Act.

D.

Writ of mandamus should issue.

Preliminary Considerations.

Under the Constitution, Congress is the principal agent of the public in control of the public domain and as such has the power of disposition and of making all needful rules and regulations with respect thereto, and the absolute right to prescribe the times, the conditions, and the mode of transferring the public lands, and to designate by whom and to whom the transfer shall be made. *Butte City Water Co. v. Baker*, 196 U. S. 119, 126; *Terrace v. Thompson*, 263 U. S. 197; *Utah Power & Light Co. v. United States*, 243 U. S. 389; *Gibson v. Choteau*, 13 Wall. 92.

The Land Department is only a sub-agent designated by Congress to carry out the will of Congress with respect to the general care and disposition of the public lands and to perform certain specific duties. *Kirwan v. Murphy*, 189 U. S. 35.

A.

The refusal of the respondents to accept or consider any applications for prospecting permits after March 12, 1929, and their refusal to accept or consider petitioner's application is contrary to the Leasing Act of February 25, 1920.

1. *The purpose of the Act of February* 25, 1920 *(hereinafter generally referred to as the Leasing Act) was to encourage the exploration of the public domain and the discovery of its mineral resources, and to promote the mining of oil and gas on public lands through the issuance of prospecting permits and leases.*

Prior to the Leasing Act of February 25, 1920, public oil lands were subject to complete alienation from Government ownership by patent under the placer mining laws, which had been made applicable to oil deposits by the Act of February 11, 1897 (U. S. C., Title 30, Sec. 101; 29 Stat. 526). The alienation of such lands in the manner thus provided proceeded so rapidly that the President, to insure naval oil reserves, in 1909, withdrew extensive areas of public lands from the operation of the law for such reserves under an "implied" power, and thereafter temporarily withdrew additional lands for other "public purposes" under the authority of the Withdrawal Act of June 25, 1910 (U. S. C., Title 43, sec. 141-3; 36 Stat. 847-8). By 1919, more than 53,000,000 acres of lands containing coal, oil, oil shale, phosphate, potash, and other minerals had been withdrawn (Congressional Record, 66th Congress, 1st session, Vol. 58, p. 4784).

Public lands not known to have any mineral value might also pass to private ownership under the homestead laws. For lands passing under the homestead laws, the Government received only a small homestead fee. For lands passing under the placer mining laws, the Government received a nominal payment of a few dollars per acre.

The United States was thus deriving little benefit from the valuable mineral resources contained in the public lands. The extensive withdrawals by the President from the operation of the placer mining laws prevented all exploration, development, and use of the withdrawn lands and the Government benefited to the extent of only a small sum from the disposal of the lands not withdrawn. While the United States Geological Survey, under its limited appropriations, was active to prevent the passing of valuable mineral lands to private ownership except under the placer mining laws, the operations of the Survey were too limited to give adequate protection through the discovery of the mineral value of the lands, and the Government's principal aid came from the activity of individuals who sought mineral claims to such lands, or protested or contested non-mineral entries or claims.

Under these circumstances, the Secretary of the Interior proposed a bill which, after some modification, became the Leasing Act of February 25, 1920 (Hearings before House Committee on Public Lands on H. R. 3232 and S. 2812, February 5, 1918, pp. 31, 32). Under this Act, the public lands of unknown mineral char-

acter were no longer open to unlimited prospecting by "wildcatters" and others, nor were they subject to absolute alienation. Instead, it was necessary to make application for the privilege of prospecting, permits were limited in number and acreage, and the lands were disposed of only by lease on a royalty basis. It was a new policy (*West v. Work*, 56 App. D. C. 191, 11 Fed. (2d) 828, certiorari denied 271 U. S. 689).

Under the Leasing Act, it has thus become of greatly increased importance to the Government to become informed of the mineral character of the public lands. When the mineral value of the lands is unknown, there is danger that they may pass to absolute private ownership under the homestead or other laws not applying to known mineral lands. This new policy was in itself a policy of conservation. Moreover, the United States, being entitled to royalties from leased lands, now has a direct interest in the development of the public mineral resources.

That Congress intended by the Leasing Act to put into effect a policy of development is not only supported by this background of circumstances, which indicates the advantages to the United States of such a policy, but also by the language used in the title of the Act, namely, "An Act to Promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain," the choice of the language not being an accident but the result of careful consideration in Congress (see titles of H. R. 3232 and of S. 2812, 65th Congress, 2d session); by the regulations of the Interior Department and by its decisions in cases which

have arisen under the Leasing Act (General Land Office Circular 672, par. 3, p. 8; *re* E. M. Harrison, 49 Land Decisions 139; *Enlow v. Shaw,* 50 Land Decisions 339); and by the debates in Congress which occurred in connection with the bill (Congressional Record, 66th Congress, 2d session, pp. 2710, 2711, and also 1st session, pp. 4271, 4272).

2. *The Leasing Act makes it mandatory for the Secretary of the Interior to accept applications for prospecting permits and to issue such permits to qualified applicants.*

This is shown by the language of section 1 of the Leasing Act, providing that "* * * deposits of coal, * * * oil, * * * or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act, * * *". The term "subject", according to Webster, means "placed or situated under, * * * obedient, submissive * * *"; and "subject" means to "cause to undergo". The language of section 1, therefore, means that the oil and gas in public lands should be caused to undergo disposition or should be submitted to disposition. By the action of the respondents the public lands, so far as oil and gas are concerned, have ceased to be subject to disposition.

The use of the term "authorized" in section 13 of the Act, which provides "That the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a

prospecting permit, which shall give the exclusive right for a period not exceeding two years, to prospect for oil and gas * * *", does not mean that unlimited discretion is granted to the Secretary of the Interior. Such language is consistent with the imposition of a duty. The rule is that when a public officer is clothed with power and furnished the means of doing acts which concern the public interest or the rights of individuals, the execution of such power may be insisted upon as a duty, although the statute is in terms permissive (*State of Maryland v. Miller*, 194 Fed. 775-779; *Bank v. Supervisors*, 51 N. Y. 401; *Mayor, etc., v. Furze*, 3 Hill 612 (N. Y.); *U. S. v. Cornell Steamboat Co.*, 137 Fed. 455-457-458; *A., T. & S. F. Ry. Co. v. United States*, 52 Ct. Cl. 338-352; *Chase v. United Stetes*, 261 Fed. 833; *United States Sugar Board v. De Ronde & Co.*, 7 Fed. (2d) 981-4-5-6). In no case are the duties imposed discretionary, unless, after the word "authorized" the words "in his discretion" or similar words are added. (*Chase v. United States*, 261 Fed. 833, 837; *United States Sugar v. De Ronde & Co.* 7 Fed. (2d) 981, 986.) It has nowhere been held, as contended by the respondents, that a statute using permissive language must affect vested property rights, or existing rights or values, before it will be construed as imposing an imperative duty on public officials.

In many places the Leasing Act carefully differentiates between the general mandatory duties laid on the Secretary of the Interior and the discretionary powers granted to him. In authorizing acts by the Secretary of the Interior in many of the sections, the

words "in his discretion" or "within his discretion" and "in his judgment" are used, as in sections 2, 4, 17, 18, 21, 22, 25, 29, 30, and 36. Section 32 is particularly significant in its provision that the Secretary is "authorized" to prescribe necessary rules and regulations to carry out the provisions of the Act. It would hardly be contended that the Secretary might have refused to prescribe any regulations.

It is not asserted that every person who applies is entitled of course to a permit. The Secretary must determine whether the applicant meets the statutory requirements of a permittee and whether the land described in the application is open to leasing or is excluded by the statute from its operation. Such judicial or quasi judicial discretion cannot extend to cover the refusal to entertain applications.

The Interior Department itself has not construed the Act as conferring unlimited discretion, as appears in *Martin Wolfe*, 49 Land Decisions 625, where the Department interpreted the Act as allowing the Secretary only quasi judicial discretion in individual cases, but, in any event, the Secretary cannot add to his powers by any rule or regulation made by him, and if the regulations prescribed by him for the administration of the Act actually purport that such discretion rests in the Secretary, it is submitted that they are contrary to law and not binding on the courts.

The uniform construction of State leasing acts which provide that individuals "may" apply for leases and that officials are "authorized" to grant them, has been that it is an imperative duty of the official to issue a lease when a qualified applicant submits a proper ap-

plication. (*State ex rel. Pindall v. Ross*, 55 Wash. 242, 104 P. 216; *State ex rel. Hall v. Savidge*, 93 Wash. 676, 161 P. 471; *State ex rel. Walls v. District Court* (Wyo.), 267 P. 1060; *Whiteman v. Severance*, 46 Minn. 495, 49 N. W. 255; *Frank v. Robinson* (Tex.), 8 S. W. (2d) 653; *Theisen v. Robison* (Tex.), 8 S. W. (2d) 646; *Freels v. Walker* (Tex.), 26 S. W. (2d) 627.)

The power which the Secretary of the Interior may have to protect the public interest and to exercise supervision of the public lands is not as broad as the discretion he has claimed in this case. In certain instances the Leasing Act allows the Secretary to determine his conduct in accordance with what he believes will be to the public interest, but wherever the statute intended such broad discretion to be exercised, it specifically conferred that discretion in unmistakable terms, as in sections 2, 6, 7, and 36. The general supervision of the public lands granted to the Secretary by various statutory provisions must be exercised within statutory limits. Such power of supervision conferred upon the Secretary "does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment "for the will of Congress as manifested in the granting act." *West v. Standard Oil Co.*, 278 U. S. 200; *Payne v. Central P. R. Co.*, 255 U. S. 228.

The respondents have attempted to justify their action on the ground that it is necessary to prevent waste of the oil and gas resources of the country. The Leasing Act, however, nowhere provides or implies that it may be suspended at the will of the Secretary when he conceives that oil is being wasted. On the

other hand, section 16 does provide that the permittee will use all reasonable precaution to prevent waste, and the violation of this provision constitutes ground for forfeiture of the permit or lease. Section 30 of the statute makes it further mandatory for the Secretary to *insert in leases* provision "for the prevention of undue waste * * * and such other provision as he may deem necessary * * * for the safeguarding of the public welfare." Moreover, the Secretary and the permittee may agree to suspend drilling operations in order to prevent waste (36 Opinions Attorney General 29, May 6, 1929). It is submitted that the specific provisions in the Act for the prevention and punishment of waste negative any such general or implied discretion in the Secretary to suspend the operation of the Act, so far as respects oil and gas, in order to prevent waste. Moreover, to permit the inception of rights to explore the public lands for oil does not necessarily entail the extraction of oil. Suspension of the Leasing Act would have little effect on production, since approximately three per cent of the oil produced is taken from public lands (Reports Director Geological Survey). In any event, the petitioner is not seeking a permit to waste oil. Whether, if he is permitted to go on public land which is not now within any known geological structure of a producing oil or gas well, the petitioner will discover oil; whether the alleged condition of overproduction will still exist, if and when such discovery is made; and what may happen in the event that it does then exist, are matters about which it is too early to speculate.

3. *If the Leasing Act is construed to confer authority on the Secretary of the Interior at his discretion to refuse to accept applications for prospecting permits and to refuse to accept such permits, it is unconstitutional in that it confers legislative power on an executive officer.*

Not only should statutes be so construed as to sustain their constitutionality, but a construction which raises doubtful constitutional questions must be avoided where some other construction is open (*Missouri Pacific Ry. Co. v. Boone*, 270 U. S. 466; *Baender v. Barnett*, 255 U. S. 224; *Harriman v. I. C. C.*, 211 U. S. 407; *United States ex rel. Attorney General v. Delaware, etc., Co.*, 213 U. S. 366). While Congress can delegate discretionary authority to an executive officer to determine in a specific case when and how the powers legislatively conferred are to be exercised, and to establish rules and regulations not contrary to the act, fixing the manner in which the requirements of the statute are to be met (*La Coste v. Department of Conservation*, 263 U. S. 545; *United States v. Grimand*, 220 U. S. 506; Willoughby, Constitutional Law, sec. 1077, p. 1637); and while Congress may authorize an executive officer to suspend the provisions of an act under given circumstances so long as the facts which are to determine the suspension are precisely stated by the legislature and certainly ascertained by the executive, and there is nothing involving the expediency or the just operation of such legislation left to the determination of the executive officer (*Field v. Clark*, 143 U. S. 649;

Butterfield v. Stranahan, 192 U. S. 470); Congress cannot delegate to an administrative official the power to cut down the rights given by statute (*United States v. George*, 228 U. S. 14; *Field v. Clark*, 143 U. S. 649, 694; *Johnson v. Keating* (C. C. A. 1), 17 Fed. (2d) 50, 52). If the Leasing Act allows the Secretary of the Interior to suspend it, then, since the conditions, the contingencies, or the exigencies under which this action may be taken are not defined in the statute, the act must be held unconstitutional in so far as it attempts to confer any such authority. It is submitted, therefore, that the statute may not properly be so construed.

B.

There has been no valid, effective withdrawal of all public lands from prospecting for oil and gas.

1. *The extreme limit of the present power of the Executive to make general withdrawals of public lands is defined by the Act of June 25, 1910.*

The respondents have defended their action in refusing to issue permits as a temporary withdrawal of public lands from the operation of the Leasing Act.

It follows from the fact that Congress has full charge of the public domain under the Constitution, that authority for any Executive withdrawal or withholding from disposition of lands which Congress has made subject to disposition, must be derived from statutes expressly conferring such authority, or from Congres-

sional acquiescence (*United States v. Midwest Oil Co.*, 236 U. S. 459; *Burfenning v. Chicago, etc. R. Co.*, 163 U. S. 321; *United States v. Tichenor*, 12 Fed. 415, 422; *Grisar v. McDowell*, 6 Wall. 363; Re Fort Boise Hay Reservation, 6 Land Decisions 16; 17 Opinions Attorney General 160).

Prior to 1909, the President had on a number of occasions, by special order or proclamation and sometimes informally, withdrawn lands which Congress had thrown open to acquisition. Thus, proclamations establishing Indian reservations, military reservations, and bird reserves had been issued. At that time, it was possible for a citizen to obtain an absolute patent to oil and gas land. By 1909, the public oil lands in California and Wyoming were rapidly being patented, and in that year, the President, in order to insure naval oil reserves, withdrew from the operation of the mining laws certain tracts of land in these states.

The validity of this withdrawal was tested in the case of *United States v. Midwest Oil Company*, 236 U. S. 459, in which this Court held that, while Congress has supreme legislative power over the public domain and exercises the power of a proprietor therein, it could waive its strict rights, and that by silent acquiescence in the Presidential withdrawals made without statutory authority, the President, in effect, had been constituted the agent of Congress, the principal, with implied power to make withdrawals for public purposes.

This decision was rendered in 1915. Shortly after the withdrawal of 1909, President Taft, in a special

message to Congress, requested Congress "by statute to validate the withdrawals that have been made by the Secretary of the Interior and the President, and to authorize the Secretary of the Interior, temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise * * *". (See *United States v. Midwest Oil Company*, 236 U. S. 459.) In response to this message Congress passed the Act of June 25, 1910 (36 Stat. 847), which will be referred to hereafter as the Withdrawal Act. However, instead of authorizing the Secretary of the Interior to withdraw lands as the President had requested, Congress provided that the *President* might, at any time, in his discretion, *temporarily* withdraw any of the public lands from settlement, location, sale or entry, and reserve such lands for water power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, such withdrawals or reservations to remain in force until revoked by him or by act of Congress. The Act further provided that the Secretary of the Interior should report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

The petitioner submits that the Withdrawal Act defines the extreme limit of the present power of the Executive to make general withdrawals of public lands, and that any withdrawal made since the date of the Act must have been made in the manner and form and for the purposes therein prescribed. In the Midwest

case, this Court reviewed the legislative history of the Withdrawal Act and noted that the majority of the Senate Committee in charge of the bill had reported that the President already had a general power of withdrawal and recommended the passage of the pending bill "inasmuch as it operated to restrict the greater power already possessed. Sen. Rep. 171 (61st Congress, 2nd session)." In the dissenting opinion in the same case it was observed that only restricted authority for the future was granted in the Act of June 25, 1910. In *Utah v. Lichliter*, 50 Land Decisions 231, it was stated that the Withdrawal Act was formal recognition of the power of withdrawal and was intended as a limitation thereof rather than a grant of greater power. While, therefore, prior to the Withdrawal Act the President may have had rather broad implied power because of the silence of Congress, after Congress defined the power by statute, the President's authority was thereby limited and any general withdrawal made since then must have been made in the form and manner and for the purposes prescribed by the Act (*United States v. Nicoll*, 1 Paine 646, Fed. Cas. No. 15879; *Mechem, Public Officers, sec.* 511).

The statement in the opinion of this Court in the Midwest case (page 483) that Congress was studious to avoid doing anything which would affect either the public or private rights, and therefore, used language which showed, not only that the statute was not intended to be retrospective, but was not to be construed either as a recognition, enlargement, or repudiation of rights like those asserted by the petitioners, had ref-

erence, not to the right of the President to make withdrawals, but to the respective rights of the United States and of individuals where there had been an entry upon withdrawn land after the Taft withdrawal but before the passage of the Withdrawal Act.

2. *The action of the executive officers in the present case was neither intended as a withdrawal under the Act of June* 25, 1910, *nor did it comply therewith.*

So far as the record shows, the only acts which might be claimed to constitute an Executive withdrawal are two orders of the Secretary of the Interior to his subordinates (R. pp. 16-19). The opinion of the Court of Appeals of the District of Columbia refers to two statements of the President to the press, a telegram of the Commissioner of the Land Office to Registers, and an order of the Secretary of the Interior appointing a Departmental committee to consider existing oil and gas permits (R. pp. 29-31), none of which are included in the Record.

Neither in the President's press statement, nor in the Secretary's orders was there any mention of a withdrawal nor any reference to the Withdrawal Act. The President's message to Congress of December 3, 1929, referred to the matter as a suspension of the issuance of permits and made no mention of a withdrawal. In the 1929 Report of the Secretary of the Interior under the heading of "Oil & Gas Applications", the Secretary referred to the "oil conservation policy" under which "no new applications for prospecting permits had been received" and the portion of the Report

dealing with the withdrawals makes no mention of oil and gas lands, but refers to a small acreage withdrawn for other purposes (1929 Report of the Secretary of the Interior, pp. 29, 32).

Not until the filing of the answer of the respondents to the Rule to Show Cause in the present case was it contended that there had been a withdrawal of public lands. It is apparent, therefore, that the President had no intention of making a withdrawal and that neither he nor the Secretary of the Interior for nearly a year after the suspension of the issuance of permits considered there had been a withdrawal.

It is submitted that the action of the respondents in question cannot be brought within the Withdrawal Act for the following reasons:

(1) Withdrawals may be made only by the President, and in the present case the President has performed no official act, either by ordering a withdrawal, or by approving a withdrawal already made by the Secretary of the Interior.

That withdrawals may be made only by the President appears from the following considerations: (a) that Congress, though requested by the President "to authorize the Secretary of the Interior temporarily to withdraw lands," conferred the withdrawal power on the President instead (see *United States v. Midwest Oil Co.*, 236 U. S. 459); (b) that the power is not inherently or constitutionally executive, but is derived from Congress by statute, and so must be personally exercised (*United States v. Benner, Baldwin*, 234, 24 Fed. Cas. No. 14568; 7 Opinions Attorney General 453, 475); (c) that the statute required the President

to exercise his discretion and such power could not be delegated, even to a Cabinet officer (*Truit v. United States,* 38 Ct. Cl. 398; Mechem, Public Officers, sec. 567; 39 Cyc. 703); and (d) that in the past, the Executive has interpreted the statute as requiring a proclamation to effectuate a withdrawal, withdrawals under the Act of June 25, 1910, having been made either by direct order of the President bearing his signature, or by order of the Geological Survey signed and approved by the President upon the recommendation of the Director of the Geological Survey and the Secretary of the Interior.

In the present instance, the President had issued no direct order, either oral or written, under which the Secretary could act. It is not necessarily to be presumed that a Cabinet officer acts by direction of the President (*Kelly v. Dalles City,* 19 Ore. 229, 24 P. 449; *United States v. McGraw,* 12 Fed. 449). The fact that Cabinet officers sometimes made withdrawals prior to the Withdrawal Act cannot support the present action of the Secretary of the Interior because in the earlier instances referred to there was either prior statutory authority for the action, as in *Wood v. Beach,* 156 U. S. 548; or subsequent statutory ratification of the withdrawal, as in *Wolsey v. Chapman,* 101 U. S. 755; or the President, acting under statutes expressly conferring such power, withdrew the land by proclamation after the Secretary had purported to make a withdrawal, as in *United States v. Morrison,* 240 U. S. 192; or the land was taken over and continuously used by the government department for purposes authorized by statute so that it might be said there was an

appropriation of the land, as there was in *Wilcox v. Jackson*, 13 Pet. 498. Moreover, in view of the restrictive nature of the Withdrawal Act, it does not follow that because the Secretary made withdrawals prior thereto, he may still lawfully exercise that power.

(2) Nowhere does it appear that any particular lands have been withdrawn from the operation of the Leasing Act. The order in this case does not describe any land, but authorizes the local register to refuse any application for a permit. The withdrawals made before March, 1929, either prior to the 1910 Act or subsequent thereto, have been withdrawals of particular land. Prior to the Withdrawal Act it had been held that withdrawals could be made only of particular lands and that failure to describe the land invalidated the withdrawal. *United States v. McGraw*, 12 Fed. 449; *Lockhart v. Johnson*, 181 U. S. 516. The provisions of the Withdrawal Act requiring the Secretary of the Interior to report withdrawals to Congress indicates that Congress intended that withdrawals should be made only of particular lands by specific Executive order describing such lands.

(3) The alleged withdrawal was not temporary. There is no intimation in either the President's statements or in the Secretary's orders that the alleged withdrawal is to be of temporary duration. The Withdrawal Act authorized only temporary withdrawals.

(4) There was no withdrawal for a public purpose within the meaning of the Act. The Withdrawal Act authorized the President to withdraw and reserve lands only "for water power sites, irrigation, classification

of lands, or other public purposes to be specified in the orders of withdrawal." Under the rule of ejusdem generis (Lewis' Sutherland, Statutory Construction, 2d Ed., sec. 422), it is submitted that withdrawals for public purposes under the Withdrawal Act may be made only for purposes of the kind specifically enumerated in the statute, and that the authority to withdraw lands for these purposes refers to governmental use necessary for the proper discharge of executive functions, and does not authorize any broad exercise of power independent of an immediately intended governmental use. Withdrawals hitherto made under the Withdrawal Act were for specific purposes contemplated for governmental use of the land, as to provide military reservations (47 Land Decisions 143); Indian reservations (49 Land Decisions 592); water power sites and reclamation projects (48 Land Decisions 85); to permit a resurvey of lands (49 Land Decisions 597); in aid of proposed legislation to extend the boundaries of a national park (48 Land Decisions 279); to determine whether lands should be classified as mineral in character and therefore not subject to entry under the homestead law (48 Land Decisions 283); and for other purposes. An attempted withdrawal under the Act of March 1, 1847 (9 Stat. 146), which was not made for a then existing public necessity, but was merely a provision contemplated for the possibilities of the future was held invalid by this court in *Spaulding v. Chandler*, 160 U. S. 394. The Interior Department has recognized that the proper purposes of withdrawals are

governmental uses necessary to the proper exercise of executive functions (47 Land Decisions 362).

(5) The purposes for which a withdrawal is made must be specified in the order of withdrawal. This is specially required by the Act. The two telegrams of the Secretary of the Interior which constructed the so-called order of withdrawal failed to specify any purpose for which it was made.

(6) The requirement of the Withdrawal Act that the Secretary report to Congress all withdrawals made by the President has not been complied with. Such failure may be excused only on the ground that the Secretary, as the agent of Congress, had a well-founded belief that no withwrawal had been made.

For the foregoing reasons it is submitted that there has been no valid withdrawal under the provisions of the Withdrawal Act from which executive authority to withdraw lands must be derived.

3. *Even if, in addition to his express power under the Act of June 25, 1910, the President has implied power to withdraw public lands under the doctrine of United States v. Midwest Oil Co., 236 U. S. 459, the alleged withdrawal here involved cannot be supported on the authority of that decision.*

The respondents have attempted to justify their action under the authority of the decision of this Court in the case of *United States v. Midwest Oil Company*, 236 U. S. 459, and the Court of Appeals in its opinion states that "it well might be held that an implied power to withdraw public lands was imposed in the President

under the Act of 1920. *United States v. Midwest Oil Company*, 236 U. S. 459." (R. p. 35.)

The situation in the Midwest case, however, is clearly distinguishable from the present situation. The withdrawal there involved was accomplished by Presidential proclamation, which by its title and terms was stated to be temporary and in aid of proposed legislation; there was no attempted withdrawal of all public lands, but a withdrawal only of a comparatively small and specifically described area; the withdrawal was made at a time when it was possible to obtain absolute title to oil lands; and the power was exercised for the admittedly public purpose of providing petroleum reserves for the navy, and is sustainable probably on that ground alone, since the President is the Commander-in-Chief of the Army and Navy. In the Midwest case, therefore, the President, although doubtful of his authority, intended to make a withdrawal and did everything possible to effectuate that purpose. In the present case there was neither an intention to make a withdrawal nor any act from which might be implied a withdrawal. Since a valid withdrawal has the effect of precluding the acquisition or initiation of certain rights, informal or implied withdrawals are disfavored. There must be some unequivocal act to constitute a withdrawal (*Lockhart v. Johnson*, 181 U. S. 516; *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 U. S. 629; *St. Paul, etc. Ry. Co. v. Sage*, 71 Fed. 40; *McLaughlin v. Menotti*, 89 Cal. 354, 26 P. 880).

C.

The Executive has no power to make a general withdrawal of all lands from the operation of the Leasing Act.

The Withdrawal Act was passed at a time when the government followed a policy of *selling* instead of *leasing* oil lands. It was to prevent complete alienation of land that withdrawals were authorized by Congress. The authority conferred by the Withdrawal Act, therefore, is to withdraw lands from "sale" and also from "settlement", "location", and "entry", all of which are steps taken under statutes which allow the complete alienation of the government's title and which, when properly performed, entitle the entryman or settler to a patent. Thus, the term "settlement" as used in public land law refers to the steps which a citizen may take by way of establishing his residence on the land with a view to obtaining a patent. (*Great Northern Railway Co. v. Reed*, 270 U. S. 539.) An oil prospector under the Leasing Act in no sense "settles" on the public land as the term is used in the Withdrawal Act. Similarly the terms "location" and "entry" pertain to purchase or acquisition of title (48 Land Decisions 459). The Interior Department has held that a prospecting permit under the Leasing Act "* * * is not a mode of disposition, but preliminary to leasing." (*Utah v. Lichliter*, 50 Land Decisions 231.)

Prior to the Withdrawal Act the government had followed the policy of leasing certain lands (35 Stat.

783, 28 Stat. 305, 31 Stat. 229), yet the Withdrawal Act did not authorize withdrawals from such leasing. Moreover, when Congress has intended to allow withdrawals from leasing, it has specifically conferred such power, as in the Act of October 20, 1914, 38 Stat. 742.

If the President may withdraw lands from the operation of the Leasing Act, it should follow that when lands are withdrawn "from settlement, location, sale or entry" they are also withdrawn from prospecting and leasing, but the Interior Department has held that such withdrawals do not prevent the issuance of prospecting permits and leases (49 Land Decisions 139; 48 Land Decisions 459). This follows the general rule that withdrawal of land from "sale or entry or preemption" does not withdraw the land from other modes of disposition (*Northern Pacific R. Co. v. Hinchman*, 53 F. 523; *Northern Pacific R. Co. v. Sanders*, 49 F. 129 aff. 166 U. S. 620; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46; 50 *Corpus Juris* 1054).

Assuming, however, that a properly executed withdrawal of lands from "settlement, location, sale or entry" would operate to prevent oil prospecting or leasing, there has, in fact, been no such withdrawal, for public lands are still open to "settlement, location, sale or entry," and citizens may still proceed to acquire public lands under the general land laws, and it follows that public lands are still legally open to those desiring to explore for oil.

That Congress contemplated no general withdrawal from the operation of the Leasing Act is evident from the fact that one of the purposes in passing the Leas-

ing Act was to get the public domain out from under the effect of outstanding executive withdrawals, which at the time the act was passed, totalled more than 53,000,000 acres (Congressional Record, Vol. 58, 66th Congress, 1st session, pp. 4784, 4287, 4580, 4290 & 4741).

D.

The writ of mandamus should issue.

In the opinion of the Court of Appeals it is stated that "mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, to remedy and not to promote a wrong, to compel the performance of an actual duty rather than to direct the performance of an act which will work public or private mischief. While classed as a legal remedy, its issuance is largely governed and controlled by equitable principles." (R. p. 36.) The court also observed that "the President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location" and that "his orders, issued through the Secretary, were intended to meet an emergency occasioned by the great over-production of oil and gas, the waste incident thereto, and other public considerations." (R. p. 36.)

The implication is that it is the duty of the Secretary and the President to determine what is for the good of the public, and, if the policy of Congress as expressed in a statute conflicts with the opinions of the President and the Secretary, they may dispense with the statute and initiate their own policy without amenability to

the courts. It is sufficient answer to point out that the obligation imposed upon executive officers to see that the laws are faithfully executed does not imply any power to forbid their execution (*Kendall v. United States*, 12 Pet. 524, 612). There is nothing in the Record in the instant case to warrant the judicial assumption that reckless waste and irreparable dissipation of resources would follow if the Leasing Act is again allowed to operate as intended. As has already been pointed out, the law provides the means for the prevention of waste and the protection of the public welfare, and the respondents have adduced nothing to show the inadequacy of the statutory methods.

The discretion which the court exercises as to the issuance of a writ of mandamus is a judicial discretion resting on equitable principles and exercised in accordance with well settled rules of law (*United States v. Lane*, 249 U. S. 367). It has been held an abuse of such discretion to refuse the writ where a statute regulating the matter is thereby abrogated and the relator has no other remedy (*United States ex rel. McBride v. Shurz*, 102 U. S. 378; *State v. Dickerson*, 33 Nev. 540, 113 P. 105; *State v. Werra Aluminum Foundry Co.*, 173 Wis. 651, 654; 182 N. W. 354, 22 A. L. R. 1).

In the present case, the petitioner, having been deprived of a statutory right, has no remedy except mandamus. Oil and gas lands are to be disposed of only in the manner and form provided by the Leasing Act and the Secretary refuses to carry out that act. On the other hand, although the Leasing Act provides lawful means for preventing and punishing waste and

protecting the public welfare, and although the Secretary may agree with permittees to suspend drilling to prevent waste and over-production, he has chosen to disregard the law and arbitrarily refuses to consider any applications or to issue any permits. The case is much like that of *United States ex rel. McBride v. Shurz*, 102 U. S. 378, 383, 404, in which this Court ordered the issuance of mandamus after considering that the relator had no other remedy, whereas there were other ways in which the Secretary of the Interior might prevent the "public mischief" and "hardship" which it was alleged would result.

The writ may properly be refused on equitable principles where the relator comes into the court without clean hands (*United States v. Burleson*, 255 U. S. 407; *Duncan Townsite Co. v. Lane*, 245 U. S. 308); where he has been guilty of laches (*Sheffield v. Fountain*, 101 Okla. 168, 224 Pac. 339); where issuance of the writ would cause numerous legal disputes and in the end would be fruitless (*Board of Directors v. Board of Excise*, 31 Okla. 553, 122 Pac. 520); where the relator seeks to obtain a personal advantage through the mistake of a public official (*People ex rel. Wood v. Assessors*, 137 N. Y. 201, 33 N. E. 145); and where the damage to relator is purely theoretical, present procedure not clearly illegal, and relator seeks to compel a strict compliance with the letter in disregard of the spirit of the law (*People ex rel. Harlem Storekeepers' Assn. v. Hylan*, 194 N. Y. S. 179). If, however, mandamus is otherwise appropriate, the writ is not to be refused on the basis of vague speculations as to which

of two governmental policies might be of greater ultimate benefit to the country, or on speculations as to which of two statements is true (*Delaware L. & W. RR. Co. v. Rellstab*, 276 U. S. 1, 5). Mandamus would become valueless as a remedial writ against defaulting public servants if it is to be denied in every case where the cry "*pro bono publico*" is raised (*Cf. Roberts v. United States*, 176 U. S. 221; *Wilbur v. United States ex rel. Krushnic*, 280 U. S. 306).

The decision of the trial court that mandamus should issue in the present case is entirely in accord with the equitable principles controlling issuance of the writ. The petitioner sought to comply with the law, not to annul it. Having no other remedy, he seasonably applied to the court for exercise of its extraordinary jurisdiction to compel a public official to perform a statutory duty. If the petitioner is right in his position that the Leasing Act is mandatory, and there has been no withdrawal, it is submitted that in the absence of any abuse or unlawful exercise of discretion, the propriety of issuing the writ is not a proper subject for the review of the higher courts (38 *Corpus Juris*, 949, 950, *East St. Louis v. Amy*, 120 U. S. 600; *Little Rock v. United States ex rel. Howard*, 103 Fed. 418, 426; *People ex rel. Lehmaier v. Interurban St. Ry. Co.*, N. Y. Ct. App. 69 N. E. 596).

CONCLUSION.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers

by granting a writ of certiorari, and thereafter reviewing and reversing the decision of the Court of Appeals of the District of Columbia

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